HO WENG KEONG, RE

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[BANKRUPTCY NO. 29-40-1991]
2 JUNE 1992

BANKRUPTCY: *Affidavit verifying petition sworn before the presentation of the creditor's petition - Whether bad in law - Second affidavit filed more than six months after the alleged act of bankruptcy - Whether the second affidavit affirmed nullify the first affidavit - Section 6(1) of the Bankruptcy Act 1967, rr. 106, 108, Bankruptcy Rules 1969.*

The judgment debtor filed a notice of motion praying for the creditor's petition to be struck out for non-compliance with s. 6 of the Bankruptcy Act and r. 106 of the Bankruptcy Rules 1969.

The affidavit verifying the creditor's petition had been affirmed on the same day as the date of the petition. Both were presented to the Court on the following day. More than seven months later the judgment creditor filed a second affidavit verifying the same petition. Counsel for the judgment debtor argued that the first affidavit was bad, being sworn before the presentation of the petition. Further, the effect of filing a second affidavit was in fact nullifying the earlier affidavit.

The second affidavit had then to be considered. Counsel argued that since the alleged act of bankruptcy occurred more than six months prior to the affirmation of the second affidavit, this affidavit was also bad.

Held:

[1] All the facts relating to the statements found in the petition were already before the deponent at the time he swore to them. They were within his knowledge when he swore to their truth. Neither the Bankruptcy Act nor the Rules specifically state that the affidavit must be affirmed **after** the **filing** or **presentation** of the petition. Since the petition and the affidavit were together before the Court, this was not the case of an affidavit supporting an "unborn" petition.

[2] Once a petition has been presented before the Court within six months of the alleged act of bankruptcy (see s. 5(1)(c) of the Act), it remains with the Court. There is no statutory provision stating any limitation of six months from the act of bankruptcy within which an **affidavit** verifying the petition must be affirmed. Time is not the essence for the filing of a verifying affidavit.

[3] The first affidavit is found to be good in law. Even if it fails, the second affidavit serves to rectify the error made by the first affidavit.

[Motion dismissed with costs. Receiving and adjudication order made against the judgment debtor.]

Cases referred to:
Sobri bin Arshad v. Associated Tractors Sdn. Bhd. [1991] 3 CLJ (Rep) 756 ***(cit)***
Chin Yoon Timber Co. v. Overseas Lumber Bhd. [1978] 2 MLJ 173 ***(cit)***

Legislation referred to:
Bankruptcy Act 1967, ss. 5(1), 6(1), (7)
Bankruptcy Rules 1969, rr. 106, 108, 115
Companies (Winding-up) Rules 1972, r. 26

For the judgment debtor - Noraskin bt Jamaludin; M/s. Balendran Chong Haranay & Bodi
For the judgment creditors - A. Ramanathan; M/s. Loke Chew & Zainal

JUDGMENT

Lamin Mohd. Yunus J:

In these bankruptcy proceedings, the creditor's petition was dated 3 July 1991 and the affidavit verifying all the statements contained in this said petition was affirmed on the same day, that is, 3 July 1991. Both the petition and the affidavit were presented to this Court on the following day, that is, 4 July 1991. On 12 December 1991, the judgment debtor filed a notice of motion (Encl. 11A) praying for the creditor's petition to be struck out for non-compliance with s. 6 of the Bankruptcy Act 1967 and r. 106 of the Bankruptcy Rules 1969. On 26 February 1992, the judgment creditor filed a second affidavit to verify the same creditor's petition presented on 4 July 1991. The motion (Encl. 11A) was heard on 6 March 1992 and I dismissed it with costs. Following the dismissal of the motion, I made a receiving order as well as an adjudication order against the judgment debtor.

Briefly the arguments of the learned Counsel for the judgment debtor in support of her motion were that the filing of the second affidavit on 26 February 1992, (affirmed on 25 February 1992) had the effect of nullifying the first affidavit and also on the authority of *Sobri B. Arshad v. Associated Tractors Sdn. Bhd.* [1991] 3 CLJ (Rep) 756; the first affidavit was bad as it was sworn before the presentation of the creditor's petition. The second affidavit was also bad as it was not affirmed within six months from the alleged act of bankruptcy.

Subsection (1) of s. 6 of the Bankruptcy Act 1967 states:

> A creditor's petition shall be verified by affidavit of the creditor or ...

It is the statements contained in the petition that are required to be verified as to their truth. As I understand it, a deponent can only depose as to the truth of facts that are existing or have existed. Now the facts or statements in the present petition were dated 3 July 1991 and the affidavit verifying those facts was also dated the same day, and its paragraph 2 directs our attention to "all the statements in this petition (segala pernyataan dalam Petisyen ini). It cannot be denied that "all those statements" were already before the deponent at the time when he affirmed the affidavit. Nowhere either in the Act or the Rules is it stated that the affidavit must be affirmed **after** the **filing** or **presentation** of a petition. Of course it goes without saying that any cause or matter that seeks the decision of or determination by the Court must first be filed in the registry of the respective Court. That is the only way for a case to be placed before a Judge. In the case of a winding-up of a company, r. 26 of the Companies (Winding-up) Rules 1972 expressly provides that the affidavit in support "shall be sworn after and filed within four days **after** the petition **is presented** ..." (See the case of *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* [1978] 2 MLJ 173). There must be a good reason why such a condition is imposed in proceedings against a company. If in every case, the Bankruptcy Rules of 1969 demand that the affidavit shall be affirmed and filed only **after the presentation** of the creditor's petition, then it shall be so stated. On the facts of the case before me, what we are saying to the deponent of the first affidavit is that his affidavit is of no effect and cannot serve to **verify** the statements in the creditor's petition notwithstanding the fact that those statements had been placed before him and were within his knowledge before he swore the said affidavit except for the fact that both the petition and the affidavit were filed one day later. If those statements had been placed before him and were within his knowledge before the deponent swore the affidavit surely he must have

sworn the truth and therefore there was absolutely no reason for refusing to accept his affidavit. The creditor's petition was filed and presented on 4 July 1991 though it was prepared the previous day. The affidavit was filed together with the creditor's petition on 4 July 1991 though it was sworn the previous day having properly verified as to the contents of the petition. Of course an affidavit cannot support an "unborn petition" because there is nothing for the Court to decide as the petition is not before the Court. Now both the petition and the affidavit are together before the Court and in my view, there is no flaw in the affidavit. In the circumstances, I am not prepared to take the life of this newly born babe, the petition, by striking it out on the ground that its apparent life support system, the affidavit, has been alleged to be technically faulty.

Now, coming to the second affidavit that was filed on 26 February 1992, can it be said as submitted by Counsel for the judgment debtor that by filing the second affidavit shows that the first affidavit is bad and cannot be relied upon and in fact is an admission that it is bad. I am indeed tempted to agree. If a private citizen is at first sure that he has sworn the truth and becomes unsure of the validity of his affidavit upon being made aware of the intention to challenge it, he then comes to Court and files a second affidavit with the hope that if he is thrown out on his first affidavit, he may not be thrown out the second time. He has not however provided an explanation when filing the second affidavit. When *Sobri's* case was thrown at his face, must an unfavourable inference be immediately drawn against him because by filing the second affidavit it was an admission by him that the first affidavit was bad even though this Court is not even bound by *Sobri*. I think he is still entitled to be heard. I have said all I need to say about the first affidavit. In regard to the second affidavit, it was submitted before me that it was equally bad but for a different reason in that it was affirmed more than six months from the alleged act of bankruptcy. There is no statutory provision imposing a limitation of six months from the act of bankruptcy within which an affidavit verifying the petition must be affirmed. Subsection (1)(c) of s. 5 of the Act merely stipulates that a creditor "shall not be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition". If the act of bankruptcy occurs more than six months before the presentation of the petition, the petition shall not be allowed to come to life because the creditor has lost his right to present it. But for so long as the entitlement is available to him, meaning within the period of six months, the creditor may present his petition at any time within the period and once presented, it remains with the Court. It cannot even be withdrawn without the leave of the Court: (s. 6(7) of the Act). Theoretically it can remain in the Court's file (presented) until kingdom come. But, as required by rule 108, **after the presentation** of the petition and **before sealing the copies** for service, the Registrar shall investigate the statements contained in it and where some of the statements in the petition cannot be verified by affidavit, witnesses may be summoned to prove them. Even at this stage it does not appear that the Registrar has the power to determine the quality or validity or otherwise of any verifying affidavit before him. But if he finds that some of the statements cannot be verified by affidavit, he may require the creditor to have witnesses summoned. So the presentation of evidence is not limited by way of affidavit only and when witnesses have to be summoned, the process of verifying the statements in the petition may even take more than six months. It is also the duty of the Registrar under r. 115 to appoint the time and place at which the petition will be heard and notice to that effect will be written or endorsed on the petition and the sealed copies. At the time when the Registrar has to fix the time and place of the hearing of the petition, he is not duty bound to satisfy himself whether all the statements in the petition have or can be verified. Even if the date of hearing

has been endorsed on the petition and its sealed copies, the hearing will not take place until it is served by whatever mode of service as allowed under the Rules. Even at the stage when the Registrar investigates the statements in the petition under r. 108, in my view, it is not required for the verifying affidavit to be placed before him though ideally it should. He merely makes his own judgment on the statements whether they **can** or **cannot** be verified by affidavit. Rule 108 does not use the words "**have** or **have not** been verified by affidavit".

Having considered the requirements under the Act and the Rules, the first affidavit as I have found is good in law and if that fails, then the second affidavit must serve to correct the error made by the first affidavit. I would also like to mention in passing however in regard to the application for an extension of time to file the second affidavit. Be it noted that both the Act and the Rules are silent on this question and I certainly think that such an application is unnecessary. This also goes to show that time is not the essence for the filing of a verifying affidavit.

Also found at [1992] 3 CLJ 1744